73-250

AUG 6 1973

MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. _____

DONALD F. HAYNE,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (Docket No. 72-1261)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (Docket No. 72-1261)

Petitioner Donald F. Hayne prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit, Docket No. 72-1261) on May 8, 1973 (App. C1).

(This is a companion case to *Rolf Topik et al v. Cata-*

lyst Research Corporation, et al, U.S. Supreme Court Docket No. 73-127. Citations in this Petition to an Appendix will be to the Appendix in this Court of the *Topi k* case.).

Opinion Below

At the close of Plaintiff's evidence, at a trial, the United States District Court for the Northern District of Illinois, Eastern Division (*per* William J. Bauer, D.J.) granted Defendant's motion for a directed verdict, after denying a Motion for a Mistrial made by Plaintiff on the ground that denial of discovery in the case had prevented Plaintiff from presenting a *prima facie* case. The Order of the District Court was dated January 25, 1972, is unreported and is printed at App. C . The Order and Opinion dated May 8, 1973 of the United States Court of Appeals for the Seventh Circuit are unreported ported and are printed at App. C1.

Jurisdiction

The Order of the United States Court of Appeals for the Seventh Circuit as aforesaid was made and entered on May 8, 1973. No Petition for Rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

Questions Presented

Page 4 of the Petition of Rolf Topik, Doc. 73-127, is incorporated herein by reference.

Constitutional Provisions and Statutes Involved

The Constitutional provision and Civil Procedure Rules involved are the Fifth Amendment to the United States Constitution and Rules 31, 34, and 56 of the Federal Rules of Civil Procedure, printed in Appendix A, *infra*.

Statement

Pages 9-11 of the Petition of Rolf Topik, Doc. 73-127, are incorporated herein by reference.

Reasons for Granting the Writ

Pages 14-29 of the Petition of Rolf Topik, Doc. No. 73-127, are incorporated herein by reference.

CONCLUSION

For The Foregoing Reasons, The Petition For Certiorari Should Be Granted.

Respectfully submitted,

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No. 73-350. See also No. 73-127

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On Petition For Writ Of Certiorari To The Court of Appeals For The Seventh Circuit.

BRIEF IN OPPOSITION

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August 23, 1973

SORG/CHICAGO U.S.A.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-250. See also No. 73-127

DONALD F. HAYNE,

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vs.

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On Petition For Writ Of Certiorari To The Court of Appeals For The Seventh Circuit.

BRIEF IN OPPOSITION

Petitioner's counsel has joined the petition for certiorari in this case from the Seventh Circuit (*Hayne*, No. 73-250) with two other completely unrelated cases from the Fourth Circuit (*Topik* v. *Catalyst Research Corp.*, No. 73-127), and the New York Court of Appeals (*S. Wallach Co.* v. *International Business Machines Corp.*, No. .....). The petition in No. 73-127 covers all three cases. The three complaints, by different plaintiffs against different defendants, alleged:

(1) an antitrust violation and a tort claim for blacklisting and invasion of privacy by reason of detective surveillance (*Hayne*),

(2) unfair allocation of the proceeds of a merger under Maryland law, and restriction on the growth of a corporation "by torts and breaches of contract" (Pet. No. 73-127, p. 5) (*Topik*), and

(3) disparagement of the quality of the plaintiff's work, constituting a slander (*Wallach*).

The only element common to the three cases is that the unsuccessful plaintiffs were represented by the same attorney. In the *Hayne* case the first count was dismissed because of failure in the complaint to state an antitrust claim; a directed verdict was entered on the second count at the close of plaintiff's evidence. In *Topik* and *Wallach* summary judgment or its New York equivalent was granted against the plaintiffs. On the merits, none of the cases present any federal question except the antitrust count in this case, *Hayne*.

The joint petition, while conceding that (p. 16) "Looked at in isolation, each of the companion petitions for certiorari would stand a good chance of being denied as involving matters not sufficiently consequential," asserts as questions common to all that the New York and federal summary judgment procedures and rules governing appellate control of trial courts, and the federal discovery rules, violate the Fourteenth and Fifth Amendments as applied generally in practice to plaintiffs in complex cases. But all that the records in these cases establish is that none of the plaintiffs even came close to establishing a substantive claim, and that therefore their cases were summarily disposed of. The fact that the above mentioned rules may have been applied adversely to some of these plaintiffs, as well

as to plaintiffs in a few other cases, does not demonstrate or justify an inference that the rules are generally unfair to plaintiffs in complex or any other types of cases.

In this case the Seventh Circuit affirmed the District Court on the antitrust count because the complaint failed to allege "that Boeing entered into an illegal agreement with any other firm (a claim that Boeing defamed the plaintiff is not tantamount to alleging an *agreement* with other firms) or that Boeing tried to monopolize any relevant market" (App. C3) (emphasis in original). The petition does not challenge this conclusion.

With respect to the second claim that Boeing had committed a tortious invasion of privacy by using private detectives to investigate him in connection with pending litigation in the Southern District of New York (see App. C2),* plaintiff contended that he should have access to the investigative reports in order to identify the detectives and the nature of the alleged surveillance. The reports were submitted to and examined by the trial judge, *in camera, at the request of the plaintiff* (App. below, p. 109). The trial judge "characterized them as 'routine credit reports'" (App. C4), which the plaintiff himself could have provided his counsel and which would not have been relevant to plaintiff's charges. As to this question the Court of Appeals stated (App. C4):

> "Since plaintiff made no request to have the reports made a part of the record on appeal, we necessarily must accept the trial judge's characterization as accurate. The failure to require production of such documents was not, in our opinion, reversible error."

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* *Costello* v. *Pan American Airways and the Boeing Company*, No. 3 Civ. 2845 (M.P.) (S.D.N.Y.).

Petitioner does not claim that any of these rulings present important questions. His argument "that the Federal Rules of Civil Procedure are unconstitutional because they confer too much discretion on trial judges" was, properly, summarily rejected by the Court of Appeals (App. C6-7).

Since the petition for certiorari presents no question remotely worthy of review by this Court, the petition should be denied.

Respectfully submitted,

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